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No. 870

SUPREME COURT OF THE UNITED STATES

October Term, 1962

THE CONGREGATION OF SISTERS OF CHARITY OF THE INCARNATE WORD,

Petitioners,

versus

THE CITY OF SAN ANTONIO, TEXAS, and THE STATE OF TEXAS, EX REL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT WACO

THE CONGREGATION OF
THE SISTERS OF CHARITY
OF THE INCARNATE WORD

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT WACO

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, The Congregation of Sisters of Charity of the Incarnate Word, respectfully pray that a writ of certiorari issue to review the judgment of the Court Of Civil Appeals for the Tenth Supreme Judicial District of Texas, at Waco, Texas, which judgment was rendered September 20th, 1962, in cause No. 4064; In the Court of Civil Appeals

for the Tenth Supreme Judicial District of Texas at Waco, in cause entitled: City of San Antonio, et al, Appellants, vs. The Congregation of the Sisters of Charity of the Incarnate Word, et al, Appellees.

Thereafter, on the 12th day of December, 1962, Application For Writ of Error was refused, "no reversible error" by the Texas Supreme Court in cause No. A-9305. Petitioners' Motion For Rehearing of the Application for Writ of Error was overruled by the Texas Supreme Court on the 16th day of January, 1963.

OPINION BELOW

The opinion of the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas is set forth in the appendix hereto. It is officially reported in 360 S.W. 2d 580.

GROUNDS OF JURISDICTION

(i) The judgment of the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas, sought to be reviewed, was entered on September 20th, 1962.

(ii) The Motion for Rehearing in the Court of Civil Appeals was overruled without opinion, by order entered October 11, 1962.

(iii) The Application For Writ of Error was refused by the Texas Supreme Court on December 12, 1962.

(iv) The Motion for Rehearing in the Supreme Court was overruled without opinion, by order entered January 16, 1963.

(v) Jurisdiction to entertain this petition is conferred by Title 28, U. S. C., Section 1257 (3).

The Court of Civil Appeals for the Tenth Supreme Judicial District of Texas has decided a federal question of substance not heretofore determined by This Honorable Court, but which should be settled by this Court; or has decided it in a way probably not in accord with applicable decisions of this Court. The Opinion holds that Article 6674W-3, Texas Revised Civil Statutes, is ". . . not restricted in application to interstate and defense controlled system highways as appellees contend." Such opinion further holds that the cited statute empowers the State of Texas to acquire dedicated public park land by purchase or eminent domain proceedings for highway purposes, and authorizes the City of San Antoino, Texas, to convey property held by the City under deed with restrictive covenants against the use of such land for other than park purposes. Such opinion thereby deprives these Petitioners of their vested rights in such park lands without due process of law. No decision has been found in which the United States Supreme Court has passed upon this question. The decision of this question is important to the rights of persons against deprivation of their property without due process of law. The question should be settled by this Court.

Petitioners believe the true question to be different from the question as stated and decided by the Court of Civil Appeals. The petitioners believe and here assert that one of the questions for decision is whether or not Article 6674W-3, Texas Revised Civil Statutes is limited to interstate and defense controlled system highways under Title 23, U.S.C.

Furthermore, Petitioners believe that the Opinion of the Court of Civil Appeals impaired the contractual rights of petitioners in the park lands in question, contrary to the United States Constitution.

The decision of the Court of Civil Appeals, while not in direct conflict with other decisions on the direct question, in principle goes contrary to the decision of the Supreme Court prohibiting use of park lands conveyed under terms as in the instant deed to be used for different purposes. All of which questions merit this Court's consideration.

QUESTIONS PRESENTED

The questions presented for review are:

a) Whether Article 6674W-3, Texas Revised Civil Statutes, is restricted in application to Interstate and Defense Controlled Highways under Title, 23, U.S.C.

b) Whether the agreement by Respondent, City of San Antonio, to convey the park lands in question to the Respondent, State of Texas, deprives Petitioners of property without due process of law.

c) Whether the agreement by Respondent, City of San Antonio, to convey the park lands in question to the Respondent, State of Texas, under the purported authority of Article 6674W-3, Texas Revised Civil Statutes, amounts to a State passing a law impairing the obligation of contracts, prohibited by the Constitution of the United States of America.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 10:

> "No State shall . . . pass any . . . law impairing the obligation of Contracts, . . ."

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Revised Civil Statutes, Article 6674W-3 (Title 116, Ch. 1, Texas Revivsed Civil Statutes)

This statute is set forth in the appendix hereto, pursuant to Rule 23(d).

STATEMENT OF THE CASE

The instant litigation was instituted in the 57th Judicial District Court of Bexar County, Texas, to enjoin the City of San Antonio, Texas, from conveying to the State of Texas any part of a public park located in the City (Brackenridge Park) for the construction of a freeway. Petitioners are a Religious Community who own a large University, Convent, Secondary School, and various related structures immediately abutting Brackenridge Park, and sought to have the trial court declare void a contract between the City of San Antonio and The State of Texas; whereby the City agreed to give away lands in Brackenridge Park to the State for highway purposes. The District Court granted Petitioner's Motion for Summary Judgment (on agreed facts) and enjoined the City from conveying any part of the parkland in question to the State for such purposes, and prohibited them from proceeding with the construction of a highway over any portion of such parklands.

Upon appeal to the Tenth Court of Civil Appeals at Waco, Texas, Judgment was entered reversing the decision of the 57th District Court, and rendering Judgment for the City of San Antonio and State of Texas. Application for writ of error was refused by the Texas Supreme Court.

ARGUMENT

Brackenridge Park land which the City of San Antonio seeks to convey to the State of Texas, was

acquired by deed containing restrictions against the City alienating, conveying or giving away any part of such properties for any reason. (Tr. 23-24). Petitioners purchased approximately two hundred eighty-three (283) acres of land immediately abutting the general area known as Brackenridge Park in reliance upon the deed restrictions in such grant of land, and for over sixty years have constructed an Administration Building, Educational Hall, First Science Building, Auditorium, First dormitory, Household Arts Building, Second Science Hall, Gymnasium, Library, Second Dormitory, Mental Retardation Center, Chapel, Church, Highschool, Classrooms, St. Joseph's Convent, and related buildings, with a total expenditure of over Seven Million Two Hundred Thirty-six Thousand Dollars ($7,236,760,-00). The petitioners made these improvements in reliance upon the dedication and deed restrictions of the abutting park as a park, which is complimentary to the University established by the Petitioners.

It is undisputed that the construction of an expressway through such park will effect a diversion of the original dedication, and be contrary to the deed restrictions, and be a use inconsistent with the use as a public park. (Tr. 10). Petitioners maintain that the proposed conveyance of this land by the City to the State will deprive them of their Federal Rights and be a divestation of their vested interest in such park lands without compensation, thereby depriving them of the protection afforded by the United States Constitution, Amendment XIV, Section 1.

In *Reichelderfer, et al v. Quinn, et al*, 287 U. S. 315; 53 S. Ct. 177, (p. 179 n. 3), is found the following statement by this Court, which sustains the position herein asserted by Petitioners:

> ". . . a dedication of land to the public, by an individual, or a conveyance to a municipality, to be used as a park, is subject to a condition or imposes a trust that the use be continued, breach of which may be restrained . . .".

Petitioners do not contend that the above case is similar to the instant one in fact, for in that case there was no question but that the Government owned *the lands in fee*. However, the propositions asserted by petitioners were recognized by this Court in the *Reichelderfer* case.

Again, in the case of *Barclay v. Howell's Lessee* 31 U. S. 495, this Honorable Court stated:

> ". . . if this ground had been dedicated for a particular purpose, and the city authorities had appropriated it to an entirely different purpose, it might afford ground for the interference of a court of Chancery, to compel a specific execution of the trust by restraining the corporation . . .".

The Court of Civil Appeals agreed with the Trial Court in holding that the Petitioners have a justiciable interest in the park land in question, and as abutting owners are entitled to bring the instant action to protect their interest in said lands. Therefore, the practical effect of the voluntary free gift of the lands, in reliance upon Article 6674W-3, Texas Revised Civil Statutes, impairs the obligation of the City

of San Antonio to enforce the contract between it and the public, whereby such City holds the lands in question in trust for the public. Such action, therefore, is contrary to the United States Constitution, Article 1, Section 10.

Petitioners maintained throughout this litigation that Article 6674W, Texas Revised Civil Statutes, is restricted in its application to Interstate and Defense Controlled highways under Title 23 U. S. C. The specific findings to the contrary by the State Court thereby deprives these petitioners of a valuable right, and is an erroneous decision of a federal question.

WHEREFORE, Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Civil Appeals for the Tenth Judicial District of Texas, and to all parties hereto, granting all relief to which these petitioners may be entitled, at law or in equity.

THE CONGREGATION OF
THE SISTERS OF CHARITY
OF THE INCARNATE WORD

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APPENDIX

OPINION OF THE COURT OF CIVIL APPEALS

REVERSED AND RENDERED
SEPTEMBER 20, 1962

NO. 4064

IN THE

COURT OF CIVIL APPEALS

FOR THE

TENTH SUPREME JUDICIAL DISTRICT
OF TEXAS
AT WACO

CITY OF SAN ANTONIO, EL AL, *Appellants*,

VS.

THE CONGREGATION OF THE SISTERS OF CHARITY OF THE INCARNATE WORD, ET AL, *Appellees*.

Appeal from District Court, Bexar County

OPINION

Summary judgment was rendered for appellees in their declaratory judgment action; and the City of San Antonio, the State of Texas and the State High-

way Commission were permanently restrained from furthering an attempt to effect conveyance of a portion of Brackenridge Park, or the construction of a highway thereon. Appellants do not contend the judgment was improper because of existence of material fact issues; they urge the judgment was erroneous even if the facts alleged by appellees are true. Appellants' motion for summary judgment was overruled.

Appellees prayed for a declaration that Arts. 1017-1020 and 1112, Vernon's Ann. Texas Stat. prohibit conveyance by the City without an election; for a declaration that the City is not authorized to convey; for an injunction, and alternatively, for a declaration that the conveyance would effect divestiture of the City's title to additional park property. The injunction was the only specific relief granted.

Appellants' initial contention is that plaintiffs had no justiciable interest authorizing them to maintain an action for injunction and declaratory judgment. The following facts, the parties tell us, may be assumed to be true: Appellees, a religious order and individuals, own and occupy property abutting 390 acre Brackenridge Park in San Antonio. A large portion of the park area was dedicated to the City in 1899 by conveyances providing that it should not be used for any other purpose than a public park; that the City should never alienate, convey or encumber any part of it; and, in effect, that if these conditions should be breached, the title thereto should vest in the State for the benefit of the University of Texas.

The City passed an ordinance and entered into a contract with the State providing that the City would convey to the State a portion of the park lands as right-of-way for an expressway. Appellees acquired, maintained and improved their lands in reliance on the provisions of the dedicatory deeds and dedication of the property to exclusive use as a park. The proposed multi-lane highway will carry a heavy volume of traffic which will substantially impair a portion of the park area, rendering it unfit for park purposes; and the valuable property of appellees will be substantially depreciated in value by the proposed construction. Some of these facts are stipulated; others appellants do not conclusively admit, but state the truth of all may be assumed for purposes of this appeal.

We are of the opinion appellees *do have the requisite justiciable interest in the subject matter of the suit to entitle them to maintain a portion, at least, of the action.* Lamar County v. Clements, 49, Tex. 347; Corporation of Seguin v. Ireland, 58 Tex. 183; City of San Antonio v. Stumburg, 70 Tex. 366, 7 S. W. 754; Clement v. City of Paris, 107 Tex. 200, 175 S. W. 672 on certificate from 154 S. W. 831; Look v. El Paso Union Passenger Depot, Tex. Com. App., 228 S. W. 917; Fall v. Thompson, 126 Tex. 326, 87 S. W. 2d 712, 713; State v. Clark, 161 Tex. 10, 336 S. W. 2d 612, 614; 26 C. J. S. 569; 39 Am. Jur. 842; 31 Tex. Jur. 1338.

Appellants rely on San Antonio Conservation Society v. City of San Antonio, Tex. Civ. App., 250 S. W. 8d 259, writ refused; Halpenny v. City of San

Antonio, Tex. Civ. App., 351 S. W. 2d 939, no writ; Kingsville I. S. D. v. Crenshaw, Tex. Civ. App., 164 S. W. 2d 49, writ ref. w. m.; and Clark v. City of Corpus Christi, Tex. Civ. App., 301 S. W. 2d 168, no writ, in support of the argument that "only lawfully constituted guardians of the public interest may maintain action for redress of injuries to the general public"; and that individual citizens have no such general interest in a park as to entitle them to enjoin diversion to another use, but are limited to relief by an action for damages. That these decisions are not determinative of the present problem is demonstrated in State v. Clark, 161 Tex. 10, 336 S. W. 2d 612, 617.

Appellants thereupon say that the State and City have the power of eminent domain over the park land involved, and the City is therefore legally authorized to execute the voluntary conveyance enjoined. Appellees answer that the case is governed by the general rule stated in Zachry v. City of San Antonio, 157 Tex. 305 S. W. 2d 558, 560, that no use inconsistent with use of dedicated park property may be made so long as it is so used by the public; that neither City nor State is authorized to condemn the park property already dedicated and devoted to a public use; that the proposed conveyance would violate the provisions of the deed; that no election seeking consent of qualified voters of the City under Arts. 1017-1025 and 1112, V. A. T. S. has been held.

The rule in the Zachry case, above, relied on by appellees, was applied in an attempted alienation by the City to a *private person having no power of emi-*

nent domain, and the rule was qualified by holding the municipal corporation could not divest itself of title "*without special authority from the legislature.*"

We think the provisions of *Art. 6674W-3* V. A. T. S. *are so comprehensive and specific as to leave no doubt of the intention of the Legislature to empower the State to acquire the land in question by eminent domain proceedings, as well as by purchase.* It authorizes condemnation of "Any land or any estate or interest therein; any property rights of any kind or character" which the State Highway Commission deems necessary or convenient to any State highway to be constructed, "regardless of the location of any such land, property rights, or material to be acquired," including that located within "the confines of any incorporated city." *Only specified property "used and dedicated for cemetery purposes" is excluded.* Purchase of any fee simple or lesser estate and "*any property right*" is authorized. Section 2 of that Article expressly provides that whether purchased or condemned, and property rights encompassed "include those belonging to the public" under the jurisdiction of any city. *Since the State through its agency has the express power to acquire the land by purchase or condemnation, it becomes immaterial to determine whether power of condemnation is vested in the City.*

Article 6674W-3 authorizes the governing body of every city "to make conveyance of title or rights and easements" owned by it "to any property needed by the State Highway Commission to effect its purposes in connection with the construction of opera-

tion of the State Highway system," including "those belonging to the public" under its jurisdiction. We think the statute is *not restricted in application to interstate and defense controlled system highways as appellees contend.*

Arts. 1017-1020 and 1142, V. A. T. S. prohibiting the selling of a public park without approval by a vote of the qualified electorate do not preclude the conveyance enjoined here. The City of Tyler v. Smith County, 151 Tex. 80, 246 S. W. 2d 601, 607, the Supreme Court directed a county (which asked on rehearing whether the court's original opinion prevented a street being opened through the dedicated public square of a home-rule city having the power of eminent domain) to refer to Kingsville Independent School District v. Crenshaw, Tex. Civ. App., 164, S. W. 2d 49[1] to see how this could be "accomplished even without resort to condemnation proceedings." *The procedure in the latter case was substantially what is here enjoined.* See El Paso County v. City of El Paso, Tex. Civ. App., 357 S. W. 2d 783, no writ. To construe the statutes relied on by appellant as making *an election prerequisite in the instant case would be to let a negative vote vitiate the specific power granted by Art. 6674W-3.* That statute authorizes the governing body of the city to make conveyance "*without any form of advertisement*," and had the effect, we think, of obviating *necessity for an election in the present situation.*

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[1] Writ ref. w. m., Oct. 14, 1942. Adopted, Kingsville I. S. D. v. Crenshaw, 252 S. W. 2d 1022, writ refused, Oct. 6, 1943, per Clerk, Supreme Court.

The power granted the State to condemn is not subject to consent of the electorate, and so in the present case, the concomitant authority of the City to convey without being subjected to condemnation is not so restricted.

Since the trial court granted the injunction, which is here dissolved, appellees' alternative power for judgment declaring that conveyance would effect divestiture of title was not reached, and we think we are here required to render the judgment which should have been rendered. *The effect of the proposed conveyance is not determinative of the authority for its execution, the authority of the State to construct the highway, or any consequent rights of appellees now before us.* Hence, no justiciable controversy is presented such as would authorize declaratory judgment on that question, even if it be assumed (which we do not decide) that appellees have a justiciable interest under Art. 2524-1, Sec. 2 in the subject matter of the declaration thus sought. McKinney v. Blankenship, 154 Tex. 632, 282 S. W. 2d 691, 697; California Products, Inc. v. Puretex Lemon Juice, Inc., 160 Tex. 586, 334 S. W. 2d 780. The alternative prayer calls, consequently, for an advisory opinion. The judgment is reversed, the injunction is dissolved, and judgment is rendered that appellees take nothing.

FRANK M. WILSON
Associate Justice

ARTICLE 6674W-3, TEXAS REVISED CIVIL STATUTES

In addition to other powers conferred by law, the following are added, to wit:

1. Powers of Purchase and Condemnation for Highway Purposes. (a) Any land in fee simple or any lesser estate or interest therein; any property rights of any kind or character including, but not limited to, rights of ingress and egress and reservation rights in land which restrict or prohibit the adding of new, or addition to or modification of existing improvements on such land, or subdividing the same; and any timber, earth, stone, gravel, or other material; which the State Highway Commission may in its judgment determine to be necessary or convenient to any State Highway to be constructed, reconstructed, maintained, widened, straightened or lengthened including, but not limited to, any land, property rights or materials deemed by the State Highway Commission necessary or convenient for the purpose of protecting any State Highway; draining any State Highway; diverting streams or rivers or any other watercourse from the right of way of any State Highway; storing materials and equipment used in the construction and maintenance of State Highways; construction and operating warehouses and other buildings and facilities used in connection with the construction, maintenance, and operation of State Highways; laying out, construction, improvement, maintenance, beautification, preservation and operation of State Highways, may be purchased by the State Highway Commission in the name of the State of Texas, on such terms and

conditions and in such manner as the Highway Commission may deem proper.

(b) Any land or any estate or interest therein: any property rights of any kind or character including, but not limited to, rights of ingress and egress, and reservation rights in land which destrict or prohibit for any period of time not to exceed seven (7) years the adding of new, or addition to or modification of existing improvements on such land, or subdividing or resubdividing same; and any timber, earth, stone, gravel, or other material; which the State Highway Commission may in its judgment determine to be necessary or convenient to any State Highway to be constructed, reconstructed, maintained, widened, straightened or lengthened including, but not limited to, any land, property rights or materials deemed by the State Highway Commission necessary or convenient for the purpose of protecting any State Highway; draining any State Highway; diverting streams or rivers or any other watercourse from the right of way of any State Highway; and any other purpose related to the laying out, construction, improvement, maintenance, and operation of State Highways, may be acquired by the exercise of the power of Eminent Domian by the State Highway Department in the name of the State of Texas in the manner hereinafter provided.

The purchase or power of Eminent Domain being hereby authorized is granted regardless of the location of any such land, property rights, or materials to be acquired, whether within or without the con-

fines of any incorporated city, town or village, whether same are incorporated under general or special laws, including Home Rule Cities.

In the prosecution of any condemnation suit brought by the State Highway Commission in the name of the State of Texas for the acquistion of property pursuant to the powers granted in this Act, the Attorney General, at the request of the State Highway Commission, or, at the Attorney General's direction, the applicable County or District Attorney or Criminal District Attorney, shall bring and prosecute the suit in the name of the State of Texas and the venue of any such suit shall be in the county in which the property or a part thereof is situated.

In the exercise of the powers of Eminent Domain herein conferred, the State Highway Department shall be subject to the laws and procedures prescribed by Title 52, Articles 3264 to 3271, inclusive, Revised Civil Statutes of Texas, 1925, as said Articles or said Title have been or may be from time to time amended, and shal be entitled to condemn the fee or such lesser estate or interest as it may specify in any statement or petition in any condemnation proceeding filed by it pursuant to such powers; provided however, that any statement or petition in condemnation brought by the State Highway Department pursuant hereto shall exclude from the estate sought to be condemned all the oil, gas and sulphur which can be removed from beneath the land condemned without any right whatever remaining

to the owners of such oil, gas and sulphur of ingress or egress to or from the surface of the land condemned for the purpose of exploring, developing, drilling or mining of the same; and further provided, that none of the powers granted herein shall be a grant to the State Highway Commission for the purpose of condemning property which is used and dedicated for cemetery purposes pursuant to Articles 912a-10 et seq., Vernon's Revised Civil Statutes of Texas.

2. State and Other Public Lands. The governing body of every county, city, town, village, political subdivision or public agency is hereby authorized without any form of advertisement to make conveyance of title or rights and easements, owned by any such body, to any property needed by the State Highway Commisison to effect its purposes in connection with the construction or operation of the State Highway System.

Whether purchased or condemned by the State Highway Commission, the lands, property rights and materials which are purchased or condemned may also include those belonging to the public, whether under the jurisdiction of the State or any department or agency thereof, county, city, town, village, including Home Rule Cities, or other entity or subdivision thereof.

The State of Texas hereby consents to the use of all lands owned by it, including lands lying underwater, which are deemed by the State Highway

Commission to be necessary for the construction or operation of any State Highway; provided, however, that nothing herein shall be construed as depriving the School Land Board of authority to execute leases in the manner authorized by law for the development of oil, gas and other minerals on State-owned lands adjoining any such State Highway, or in tidewater limits, and to this end such leases may provide for directional drilling from such adjoining land and tidewater area. The State Highway Commission shall advise, and make arrangements with the State Department or agency having jurisdiction over such lands to accomplish such necessary purposes. Any such State Department or agency in this connection, and as to any such department or agency not expressly authorized to act through some designated representatives, express authority is hereby granted to such department or agency to do whatever acts are necessary hereunder by and through the Chairman of its Board, Department Head, or Executive Director, whether appointed or elected, whichever may be appropriate.

If the land, property rights, or material to be acquired by the State Highway Department are of such a nature that its acquisition under the provisions of this Act will deprive any such department or agency of the State of a thing of value to such department or agency in the exercise of its lawful functions, then adequate compensation therefor shall be made, based upon vouchers drawn for this purpose payable to the furnishing department or agency. Payments received by the furnishing depart-

ment or agency shall be credited to that department's or agency's current appropriation items or accounts from which the expenditures of that character were originally made, or if no such items or accounts from which the expenditures of that character were originally made, or if no such item or account exists, then to an account of such department or agency determined to be appropriate thereto by the Comptroller of Public Acounts.

In the event, but only in the event, the Highway Department and such other department or agency are unable to agree upon adequate compensation, then the Board of Control shall determine the fair, equitable and realistic compensation to be paid. Acts 1957, 55th Leg., p. 725, ch. 300, §4.

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IN THE

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October Term, 1962

THE CONGREGATION OF SISTERS OF CHARITY OF THE INCARNATE WORD, *Petitioner*

VERSUS

THE CITY OF SAN ANTONIO, TEXAS, AND THE STATE OF TEXAS, *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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VERSUS

THE CITY OF SAN ANTONIO, TEXAS, AND THE STATE OF TEXAS, *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents, the City of San Antonio, Texas, and the State of Texas, file this brief in opposition to the Petition for Writ of Certiorari to the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas heretofore filed by Petitioner, and respectfully pray that such petition be denied for the reasons hereinafter set forth.

I.

OBJECTIONS TO JURISDICTION

A. *Failure of Petitioner to Raise Questions in State Courts.*

Petitioner, in outlining the "Questions Presented" (Pet., pp. 4-5) alleges that two constitutional questions are involved. The first question posed by Petitioner is whether the agreement by Respondent, City of San Antonio (hereinafter designated "City"), to convey dedicated park land to Respondent, State of Texas, (hereinafter designated "State") deprives Petitioner of property without due process of law (Pet., p. 4); and whether the agreement by the City to convey said park land to the State, under authority of Art. 6674 W-3, Texas Revised Civil Statutes, amounts to the passage of a law by the State impairing the obligation of contracts, contrary to the contract clause of the Federal Constitution. (Pet., p. 5)

Neither of these two alleged Federal constitutional questions were raised by Petitioner in either of the three state courts in which it attacked the agreement in question. Excluding the allegations in its Petition for Writ of Certiorari filed in this Honorable Court, among all the pleadings, briefs, and motions for rehearing, including the Application for Writ of Error to the Supreme Court of the State of Texas, nowhere do we find an assertion of rights guaranteed by the Federal constitution made by Petitioner. If Petitioner wished to conceal the true basis for its alleged cause of action from the Texas courts, he was unqualifiedly successful. This highly successful attempt by Petitioner to conceal the basis

for its claim in all probability is sufficient to explain not only the complete failure of the Texas Court of Civil Appeals to deal with the purported Federal questions in its opinion (Pet., p. 10 *et seq.*), but also the complete failure of Petitioner to comply with Supreme Court Rule 23(1)(f) which requires that the Petition for Certiorari "shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific references to the places in the record where the matter appears (e. g., ruling on exception, portions of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." In view of the state of the record in this case, the requirement just quoted placed on Petitioner a burden which it could not meet. Petitioner's failure to comply with such requirements of Rule 23 necessarily amounts to a failure of the Petition for Certiorari to show "that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

B. *No Federal Questions Are Involved.*

In addition to the contention that the agreement between the City and the State deprived Petitioner

of property without due process of law, and that the sustaining of said agreement under Art. 6674W-3, Texas Revised Civil Statutes, makes such statute invalid as state legislation impairing the obligation of contract, Petitioner, on page 4 of its Petition, advances the contention that a Federal question is involved in the determination of "whether Article 6674W-3, Texas Revised Civil Statutes, is restricted in its application to Interstate and Defense Controlled Highways under Title 23, U. S. C."

In replying to these contentions, Respondents will consider them in the order in which they are presented on pages 4-5 of the Petition.

(1). *Construction of the State Statute.* Petitioner makes no argument in support of the novel contention that the question of interpretation of a state statute involves a Federal question. There is the claim that the manner in which the statute was construed makes it invalid under the Contract Clause, but that claim is made in an attempt to raise a separate and distinct Federal question. The Texas courts have held that the statute in question is applicable and authorizes the conveyance of park land by the City to the State. It is elementary that all questions of application of a state statute are foreclosed to the Supreme Court of the United States on appeal from a decision of a state court construing the statute. *Greenough* v. *Tax Assessor of Newport*, 331 U. S. 486. The Supreme Court of the United States will accept a state court's interpretation of a state statute relating to the condemnation of land, which is the subject matter of the portion of Art. 6674W-3 in dispute in this cause. *Boston Chamber*

of Commerce v. *Boston*, 217 U. S. 189. Thus, in *Roe* v. *Kansas ex. rel. Smith*, 278 U. S. 191, this Court held that it was bound by the construction placed by the state court on a statute authorizing the acquisition, by exercise of the power of eminent domain, of places of historical interest.

It is apparent, then, that the first purported ground of jurisdiction is frivolous. Whether the Texas statute in question is applicable to the present case is a matter which is the sole concern of the Texas judiciary. This Court is bound by the determination by the Texas courts that, under Article 6674W-3, the State of Texas had authority to condemn park land owned by the City of San Antonio, and that the statute is not limited in its application to Interstate and Defense Controlled Highways.

2. *The Due Process Question.* Petitioner makes the bland assertion that the agreement contemplating the conveyance of park land by the City of San Antonio to the State of Texas deprives petitioner of property without due process of law and, therefore, violates the Fourteenth Amendment to the Constitution of the United States. Perhaps, at this point, some inaccurate statements made by Petitioner may be properly challenged. On page 6 of the Petition it is asserted that under the contract in question the City agreed to "give away" the park land in question to the State for highway use. This statement is false. The agreement in question involves ample consideration moving from the State to the City. The State agrees to bear a portion of the cost of acquiring right-of-way and also agrees to bear the entire cost of construction of the highway and its maintenance after

it is built. (TR-97-109). The State is to pay dearly for this "gift." The Petitioner makes statements on page 7 that are somewhat distorted and does not make citations to the record in connection with some of them. The total park area is three hundred and ninety (390) acres and the proposed expressway will take about fifteen (15) acres thereof (TR-113); the use of the said fifteen (15) acres for expressway purposes will be a use inconsistent with park purposes, but it is *not* "undisputed that the construction of an expressway through such park will effect a diversion of the original dedication, and be contrary to the deed restrictions, and be a use inconsistent with the use as a public park" as to the three hundred and seventy-five acres remaining. In order to understand the physical facts in this case one should refer to Defendants' Exhibit #1, a large photographic map showing the overall park, the Petitioner's property, and the route of the proposed expressway, such exhibit having been introduced in evidence by agreement (TR-5-10), and sent up to the appellate courts as a separate instrument.

Petitioner relies on a footnote found in *Reichelderfer* v. *Quinn*, 287 U.S. 315. The actual holding by this Court in *Reichelderfer* was that abutting owners had no cause to complain where Congress, after dedicating certain land to park purposes, by subsequent legislation authorized the construction of a fire station in the park. In the footnote at which Petitioner desperately grasps, apparently mistaking it for a straw, the Court merely distinguished certain cases which, the Court said, "indicated that" conveyance of land to a governmental agency to be used as

a park is subject to a condition, or imposes a trust, that the use be continued. On page 8 of its Petition, Petitioner, by carefully failing to include the entire footnote, and particularly the words "indicate that," seeks to give the erroneous impression that *Reichelderfer* involves a holding which supports Petitioner's contention.

Petitioner admits that the case at bar is not similar to *Reichelderfer*, but says that "the propositions asserted by petitioner were recognized by this Court in the *Reichelderfer* case." (Pet., p. 8) This is another false statement. The Court there squarely ruled against the contention of the abutting owners that the diversion of the park land constituted a taking of property without just compensation.

In any event, Petitioner fails completely to show the nature of the "property" of which it is being deprived. Decisions by this Court concerning the rights of abutting owners in parks owned by the Federal Government are completely irrelevant to the question of the rights of citizens of San Antonio in park lands owned by the City. Even prior to the decision in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, matters relating to the system of rights in property within a state were not considered to be proper subjects for the independent determination of this Court by reference to an assumed Federal common law, but were left entirely to the determination of the state courts.

Petitioner's reliance on *Barclay* v. *Howell's Lessee*, 31 U. S. 498 (mistakenly cited in Petitioner's brief as 31 U. S. 495) is misplaced. The quotation

from that case on page 8 of the Petition begins with the word "if", so that it appears even from the bob-tailed quotation found in the Petition that the Court was assuming a situation which was not before it. Even so, the Court further qualified its "iffy" statement by noting that if such other facts were present, they "might" afford ground for injunction.

Neither of the two dicta relied on by Petitioner involve cases of park land owned by a municipality which was conveyed by it to a governmental agency for a public purpose in furtherance of which the grantee public agency might have acquired the land by the exercise of the power of eminent domain. That is the exact situation here. The City, a creature of the State, having no constitutional rights which it could assert against its creator, conveys land to the State to be used for highway purposes. Clearly, the State, as sovereign, could have, at the very least, acquired the land in question by exercising its power of eminent domain. The Texas courts have held that the State had such power under Art. 6674W-3, and that interpretation is binding on this Court. But, even without the statute, the same conclusion is compelled by elementary principles of the law of eminent domain.

Eminent domain is an inherent attribute of sovereignty. Therefore, the power to take property for a public use is within the sovereign power of the State of Texas and requires no additional justification. The only limitation on the power of eminent domain possessed by the State of Texas is the requirement, found in the State constitution, and also imposed by the due process clause of the Fourteenth

Amendment, that just compensation be paid. See *Shoemaker* v. *United States*, 147 U. S. 282.

Since, therefore, the State could have condemned the land in question, the City and the State are free to agree on the terms and consideration of a voluntary conveyance, irrespective of the claimed common law or statutory rights of abutting owners, irrespective of state statutes or charter provisions calling for elections as conditions precedent to the conveyance of park land by municipalities, and irrespective of reverter clauses in deeds through which the City acquired title to the land in question. This proposition is amply supported by the following decisions by state courts: *People* v. *City of Los Angeles*, 1 West's Cal. Rep. 531; *Welch* v. *City & County of Denver*, 349 P. 2d 352 (Colo.); *Prekarski* v. *Smith*, 153 A. 2d 587 (Del.); *City of Louisville* v. *Milton*, 247 S. W. 2d 975 (Ky.); *Burnes* v. *Metropolitan District Commission*, 92 N. E. 2d 381 (Mass.); *City of Tyler* v. *Smith County*, 246 S. W. 2d 601 (Tex.); *El Paso County* v. *City of El Paso*, 357 S. W. 2d 783 (Tex.); *Kingsville Independent School Dist.* v. *Crenshaw*, 161 S. W. 2d 49 (Tex.). This array of authority is made even more impressive by Petitioner's failure to cite any authority to the contrary.

This Court has recognized fully the principle on which Respondents rely. In *Kohl* v. *United States*, 91 U. S. 367, Mr. Justice Strong said, at pp. 371-372:

> It has not been seriously contended during the argument that the United States government is without the power to appropriate lands or other property within the states for its own pur-

> poses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the m ans or instruments by which alone governmental functions can be performed. * * * If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a state prohibiting a sale to the federal government, the constitutional grant of power may be rendered nugatory. * * * No one doubts the existence in the state governments of the power of eminent domain, — a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being. * * * The right is the offspring of political necessity; and it is inseparable from sovereignty unless denied to it by its fundamental law.

Closely in point is *United States* v. *Carmack*, 329 U. S. 230. There the Federal Government was attempting to acquire, as a site for a post office, land held in trust by the City of Cape Girardeau, Missouri and used for such public purposes as those of a park, court house, city hall and library. The complainant, opposing such acquisition by the Federal Government, relied on the fact that the land in question was being used by the city for public purposes which had been impressed upon the land by the private owner. This Honorable Court referred to the decision in *Kohl* as a complete answer to the contention that the decisions of federal representatives had to be subordinated to those of individual grantors or local officials.

Respondents concede that if, under applicable law, Petitioner has some property right in the park land in question which will be destroyed by the use of the land for highway purposes, they will be entitled to compensation. Respondents have never denied the existence of a right to compensation under such circumstances. The Texas law, as pronounced by the Texas courts, recognizes that Petitioner would be entitled to recover, in an appropriate proceeding, such damages as they could establish to the market value of their property resulting from the use of the 15 acres of park land for highway purposes. This right was expressly recognized in *Kingsville Independent School Dist.* v. *Crenshaw*, 164 S. W. 2d 49 (Tex. Civ. App.). But Petitioner here is not seeking damages for property taken, damaged or destroyed. Instead, Petitioner is seeking an injunction on the ground that the sovereign, the State of Texas, has no right to take.

Since the Due Process Clause limits the state's power of eminent domain only to the extent of requiring that if property is taken for public use, compensation shall be paid, and since, under Texas law, if Petitioner can establish that its property has been taken, damaged or destroyed, it would be entitled to compensation, it is obvious that Petitioner is being deprived of no right guaranteed to it under the Due Process Clause of the Fourteenth Amendment.

3. *The Impairment of Contract Issue.* Petitioner says that "the practical effect of the voluntary free gift of the lands, in reliance upon Article 6674W-3, Texas Revised Civil Statutes, impairs the obligation of the City of San Antonio to enforce the

contract between it and the public, whereby such city holds the lands in question in trust for the public. Such action, therefore, is contrary to the United States Constitution, Article 1, Sec. 10." (Pet., pp. 9-10)

Respondents will frankly admit their puzzlement at the assertion that the City, by conveying land to the State in alleged violation of a restriction contained in the conveyance to the City, is impairing the obligation of the City to enforce the contract between it and the public whereby the City holds the land in trust for the public. There simply is no contract between the City and the public whereby the City holds the land in trust. The contract, if any, was between the City and its grantor. There is no rational basis for finding any obligation on the part of the City to enforce a non-existent contract between it and the public. Respondents, at least, are not surprised by Petitioner's failure to cite authority in support of its contention.

In any event, a full answer to the contention of Petitioner will again be found by considering elementary principles of the law of eminent domain. Assuming that the Petitioner has some sort of contract right, there is nothing peculiar about contract rights which places them beyond the reach of the power of eminent domain. "All contracts are subject to the right of eminent domain." *Home Building and Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 435. See also *West River Bridge Co.* v. *Dix*, 5 How. 507.

In *City of Cincinnati* v. *Louisville & N. R. R. Co.*, 223 U. S. 390, the City of Cincinnati condemned

a right of way across a public landing, which landing had been dedicated for the public use of the town forever. The abutting owners contended that the taking of the land for a different public use amounted to an impairment of their contract rights. The Supreme Court said (223 U. S. at p. 400):

> The constitutional inhibition upon any state law impairing the obligation of contracts is not a limitation upon the power of eminent domain. The obligation of a contract is not impaired when it is appropriated for a public use and compensation made therefor. Such an assertion of power neither challenges its validity nor impairs its obligation. Both are recognized, for it is appropriated as an existing enforceable contract. It is a taking, not an impairment of its obligation. If compensation be made, no constitutional right is violated.

Respondents repeat: At no time has the right of Petitioner to compensation for such of its property as may be taken been disputed. The only point in issue here is the right of Petitioner to prevent the taking, if any.

II. CONCLUSION

It is abundantly clear that the Petition for Certiorari should be denied in this case. The purported "Federal" questions relied on by Petitioner were not timely raised in the state courts, and this Court is without jurisdiction to review the judgment of the state court. In any event, the contentions advanced by Petitioner are so patently without merit as to call for the denial of the writ.

WHEREFORE, Respondents respectfully pray that this Honorable Court in all things deny the Petition for Certiorari in this case.

THE STATE OF TEXAS and
THE CITY OF SAN ANTONIO, TEXAS

By .....

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